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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. There is one principal reason why the Eighth Circuit's mandamus order is not already the subject of plenary review in this Court: rather than deciding the issue presented last September, when it received respondents' mandamus petitions, the Eighth Circuit did not rule on those petitions until January 22, 1998, literally the eve of this Court's decision to grant certiorari to resolve *all other* disputes concerning the FCC's jurisdiction to implement the 1996 Act. See Fed. Pet. 28. Respondents seek to benefit from that accident of timing in urging this Court to hold this petition and, while holding it, not to look too closely at how the Commission's statutory role under Section 271 draws the Eighth Circuit's underlying *Local Competition Decision* into doubt. See Fed. Pet. 19-20; see also pp. 5-6, *infra*.

This Court often chooses to hold a petition in one case pending its review of a judicial decision in *another* case. Here, however, the Court has already granted review of decisions arising from the *same* review proceeding that

produced the mandamus order challenged in this petition, and that mandamus order addresses a statutory provision (Section 271) that is closely related to, and essential to a complete understanding of, the local competition provisions that this Court has already agreed to interpret. The fortuitous chronology of the Eighth Circuit's decision-making should not keep this Court from having before it the entirety of the Eighth Circuit's treatment of this interrelated statutory scheme.

2. Respondents contend that plenary review of the question presented here is unnecessary because, in their view, this Court's determination of the Commission's jurisdiction to issue general rules implementing the local competition provisions of Sections 251 and 252 will resolve, one way or the other, the present dispute about the Commission's authority to conduct the inquiries required by the Bell Company long-distance provisions of Section 271. That position is both incorrect as a matter of statutory interpretation and unsound as a rationale for deferring this Court's review of the mandamus order. In asking this Court to hold rather than grant this petition, respondents have presupposed, in a stroke of circular logic, a particular (and erroneous) answer to the very question presented in this petition: whether Section 271 could mean something other than what it says.

a. Whatever the scope of the Commission's jurisdiction to issue rules implementing the local competition provisions of the 1996 Act,[1] Section 271 leaves no room for

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[1] Respondents emphasize that Section 252 gives the state commissions authority to set ultimate carrier-to-carrier rates for purposes of resolving specific interconnection disputes. The disagreement underlying the *Local Competition Decision*, however, is not about whether the state commissions have that authority, but about whether, when exercising that authority, the state commissions must follow a nationally consistent methodological framework adopted by the FCC. As we elsewhere explain (*e.g.*, 97-831 Pet. 12-16), the FCC's authority to issue

doubting the Commission's plenary authority to interpret and enforce the statutory conditions for Bell Company entry into the predominantly interstate long-distance market—a regulatory subject that, before and after the 1982 AT&T consent decree, has been a matter of uniquely federal concern. See, *e.g.*, *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); see also Fed. Pet. 16-17. Section 271 provides that "[t]he Commission shall not approve" a Bell Company's long-distance application "unless *it finds*," among other things, that such approval would be "consistent with the public interest" *and* that the Bell Company has complied with all 14 items on the checklist, including the substantive pricing requirements of Sections 251(c) and 252(d)(1). 47 U.S.C. 271(d)(3) (emphasis added); see Fed. Pet. 7, 15. In making those determinations, the Commission must employ its own, nationally consistent understanding of what it *means* to comply with those requirements and, similarly, of what "the public interest" requires. See Fed. Pet. 15-18.

Respondents argue that, in crucial respects, the Commission must cede those core inquiries to each of the 50 state commissions, with potentially radical state-by-state differences in methodology and result. That view of Section 271 is so implausible, however, that the D.C. Circuit took special care to reject it when denying a Bell Company's recent challenge to one of the Commission's Section 271 orders. As that court observed, the Commission may grant a Section 271 application only if "the FCC

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rules creating such a framework derives from several independent sources. Those include the Commission's comprehensive statutory authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of federal telecommunications law, 47 U.S.C. 201(b), as well as its obligation to "establish regulations to implement the requirements" of Section 251, 47 U.S.C. 251(d)(1), including the specific rate requirements of Section 251(c)(2)-(4).

concludes *to its own satisfaction*" that the Bell Company has met the requirements of the checklist; in particular, "[a]lthough the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight." *SBC Communications Inc.* v. *FCC*, No. 97-1425, 1998 WL 121492, at *6 (D.C. Cir. Mar. 20, 1998) (emphasis added); see also Fed. Pet. 17.[2] That decision is in direct conflict with both the Eighth Circuit's mandamus order and respondents' reading of Section 271. Indeed, like the Eighth Circuit, respondents would compel the FCC to give the State commissions' views not just "weight," but dispositive effect, on what could ultimately be the single most important dispute in Section 271 proceedings: the proper criteria for judging a Bell Company's compliance with the relevant checklist items. As the D.C. Circuit has now confirmed, that approach is irreconcilable with the text, structure, and historical background of Section 271.[3]

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[2] Respondent LECs incorrectly assert (Br. in Opp. 17) that our petition "acknowledged, before the D.C. Circuit issued its decision, that the *SBC Communications* case did not implicate 'the basic issues presented' in the present petitions." In fact, we said that *SBC Communications* and another (still pending) case "will not *require* the D.C. Circuit to address the basic issues presented here," Pet. 24 n.8 (emphasis added), because those cases could be resolved on a variety of independent legal grounds. The D.C. Circuit has now issued its decision in *SBC Communications*, and, as discussed in the text, it has based that decision on grounds that are squarely inconsistent with the Eighth Circuit's mandamus order. Moreover, although respondents labor to distinguish *SBC Communications* on the theory that the D.C. Circuit did not specifically mention "pricing" (see LEC Br. in Opp. 17), the court's holding encompasses all aspects of the Section 271 inquiry. See 1998 WL 121492, at *6 ("Unless the FCC concludes to its own satisfaction that the applying BOC *has satisfied either Track A or Track B* [see Fed. Pet. 7 n.5], *as well as the other statutory requirements*, it 'shall not approve the authorization.' 47 U.S.C.A. § 271(d)(3).") (emphasis added).

[3] Respondents assert that, even though their position would compel the FCC to give dispositive weight to the disparate methodological choices of the 50 state commissions, the FCC would nonetheless retain

b. The FCC's obligation to determine whether a Section 271 applicant has complied with the provisions of Sections 251(c) and 252(d) is powerful evidence that Congress meant to authorize the Commission to issue general rules that the state commissions would apply in adjudicating disputes between new entrants and any incumbent LEC under Sections 251 and 252. As a policy matter, it makes sense for the FCC and the state commissions to apply a single set of national standards in implementing the various aspects of this federal statutory scheme. But the interpretive analysis does not work, as respondents

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the task of determining "whether a Bell company is in *compliance*" with the States' pricing requirements. LEC Opp. 14. Respondents do not elaborate on the nature of that task, and for good reason: in their own view, the task would be meaningless. Under the *Local Competition Decision*, the state commissions, when arbitrating carrier-to-carrier disputes under Section 252, both choose a pricing methodology and set actual rates for (*e.g.*) interconnection and access to unbundled elements. And, under the *Local Competition Decision*, subsequent disputes about an incumbent carrier's compliance with those arbitrated agreements are *also* presented to the state commissions for their resolution. See 97-826 Pet. App. 32a-34a. Thus, whenever it has suited their interests, respondents have insisted that, under their approach, the state commissions' resolution of pricing disputes precludes *any* role for the FCC in addressing pricing issues under Section 271. See *e.g.*, Reply Br. in Supp. of Application by BellSouth for Provision of In-Region, InterLATA Servs. in Louisiana, CC Docket No. 97-231, at 23 (FCC Dec. 19, 1997) ("Because the checklist's pricing standard is that rates * * * must be 'in accordance with the requirements' of sections 251 and 252, the Louisiana PSC's express determination that BellSouth's rates satisfy the Act leaves no federal issue for the Commission to decide.") (citation omitted); Br. in Supp. of Application by BellSouth for Provision of In-Region, InterLATA Servs. in South Carolina, CC Docket No. 97-208, at 37 (FCC Sept. 30, 1997) ("The [South Carolina commission's] pricing determinations are conclusive. * * * Simply put, state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors * * * are off limits to the FCC.") (internal quotation marks omitted); see also Pet. App. 12a (to perform its "quite simple" role under Section 271, FCC should, *inter alia*, "simply ask[] the state commission whether the applicant BOC has complied with the state commission's pricing rules").

suppose, in the opposite direction. Cf. LEC Br. in Opp. 15-16. Resolution of the Commission's authority to implement the local competition provisions must accommodate, but cannot change, the plain meaning of Section 271.

Thus, even if this Court were to hold that the Commission lacks authority to issue rules implementing Sections 251 and 252, which govern the adjudication of disputes between any incumbent LEC and any carrier seeking entry into local markets, it would *not* follow that the Commission could ignore its obligation, under Section 271, to "conclude[] to its own satisfaction" (*SBC Communications*, 1998 WL 121492, at *6) that a Bell Company has met the checklist requirements and that the Bell's entry into the long-distance market would serve "the public interest." That statutory obligation, rooted in longstanding federal oversight of the predominantly interstate long-distance market, is not somehow contingent upon the scope of the Commission's authority to issue rules implementing the local competition provisions.

For that reason, this Court should grant our petition and consolidate its review of the mandamus order with the rest of this case. We agree with respondents that a reversal by this Court of the jurisdictional holding of the *Local Competition Decision* would require vacating the mandamus order. But an affirmance of that holding would *not* resolve the parties' dispute about whether Section 271 obligates the Commission to exercise independent judgment in adjudicating Bell Company applications for entry into the long-distance market. Nor would it resolve the new conflict between the D.C. Circuit and the Eighth Circuit on what exactly the FCC should do when a Bell Company predicates a Section 271 application on pricing practices that have received the endorsement of a state commission but that are nonetheless, in the Commission's

view, incompatible with the checklist requirements and the public interest.

Other carriers are certain to appeal to the D.C. Circuit any abdication by the Commission of its authority to "conclude[] to its own satisfaction" that the Bell Company has met the statutory requirements for entry into the long-distance market. *SBC Communications*, 1998 WL 121492, at *6. This Court will then need to intervene to relieve the Commission of its conflicting obligations under the mandates of two different courts. The principal question here is whether this Court should resolve that conflict as part of its orderly disposition of this case, or whether it should artificially detach the mandamus order from the rest of this case and resolve Section 271 disputes in a later case or, perhaps, in the context of emergency stay applications. In our view, the former course would better serve this Court, the public interest, and the telecommunications industry.

c. Moreover, unless it grants this petition, this Court's review of the Eighth Circuit's *Local Competition Decision* could not, under any scenario, cure the fatal jurisdictional defect in the Eighth Circuit's mandamus order.

As the above discussion illustrates, the parties disagree about whether, and to what extent, the *Local Competition Decision* has preclusive effect on the criteria that the Commission may employ when adjudicating Section 271 applications. See, *e.g.*, LEC Br. in Opp. 13 (mischaracterizing question of Commission's Section 271 authority as presenting mere "opportunity to relitigate" dispute about Commission's authority to issue rules implementing local competition provisions). But the jurisdictional propriety of the mandamus order depends not on how that dispute should be substantively resolved, but on which *court* has been authorized to resolve it. Congress assigned

that authority, along with authority to resolve all other issues arising in Section 271 adjudications, to the D.C. Circuit, which has extensive experience in addressing complex disputes about the intersection of the local and long-distance telephone markets.[4] The D.C. Circuit can of course give the *Local Competition Decision* whatever preclusive effect it may be due. Respondents would prefer, of course, to have the Eighth Circuit determine the effect of its *Local Competition Decision* on the nature of the Commission's inquiries under Section 271. That preference is particularly understandable now that the D.C. Circuit, in *SBC Communications*, has disagreed with respondents and the Eighth Circuit on whether the Commission must abdicate much of its role under Section 271 to the state commissions. But it is a preference that Congress has foreclosed.

More generally, respondents misapprehend the law governing the circumstances in which a court may exercise jurisdiction to enforce its mandate. A mandamus order is *not* a valid exercise of judicial authority unless the case that it affects is "one that may lie within the prospective future jurisdiction of the court of appeals, *or* that has in fact come within its jurisdiction in the past." 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3932, at 471 (2d ed. 1996) (emphasis added). This mandamus order satisfies neither of those conditions. The *Ameritech Order* and the FCC's other Section 271

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[4] Respondent State Commissions (Br. in Opp. 8) repeat the Eighth Circuit's enigmatic suggestion that the mandamus order somehow leaves the Commission's exercise of its Section 271 authority—as well as the D.C. Circuit's exclusive jurisdiction to define that authority—"untouched." That, however, is a striking mischaracterization of this mandamus order. The order not only bars the Commission from exercising independent judgment on crucial matters arising in any Section 271 proceeding, but also contradicts the D.C. Circuit's subsequent holding, in *SBC Communications*, that the Commission *must* exercise independent judgment when adjudicating Section 271 applications.

adjudications (the subjects of the mandamus order) arise in cases that are separate from, and have never been part of, the local competition rulemaking proceedings subject to review in the Eighth Circuit. Those cases have thus never "come within [the Eighth Circuit's] jurisdiction in the past," and, because Congress has consolidated review of all Section 271 decisions in the D.C. Circuit, they could never "lie within the prospective future jurisdiction" of the Eighth Circuit. *Ibid.*[5] Under respondents' position, however, once a court of appeals has reviewed an agency's order in one case, it may then control the content of that agency's orders in *all future cases* raising arguably related issues, even if Congress has assigned review of those subsequent agency orders *to the exclusive jurisdiction of another court*. Respondents propose no limiting principle to curb that implausibly expansive view of mandamus jurisdiction, perhaps because any limiting principle would necessarily place this mandamus order on the wrong side of the line.

3. Finally, respondents oppose consolidation of the question presented here with this Court's review of the *Local Competition Decision* on the curious ground that the parties have noted the relevance of Section 271 when briefing the question of the Commission's authority to issue rules implementing Sections 251 and 252. See LEC Br. in Opp. 10. That point, however, cuts squarely *against* respondents' efforts to suppress this petition until the

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[5] There is no merit to respondents' reliance on *United States* v. *United States District Court for the Southern District of New York*, 334 U.S. 258 (1948). The question in that case was whether a court of appeals that *had* temporary jurisdiction over one stage of a case (because this Court, which otherwise had direct appellate jurisdiction, was temporarily unable to reach a quorum) had continuing authority to enforce its mandate during a different stage *of the same case*. Here, by contrast, the Eighth Circuit *never* had jurisdiction over the independent Section 271 proceeding that gave rise to the *Ameritech Order*.

conclusion of this case. In effect, respondents have conceded that, because this statutory scheme must be viewed as a whole anyway, granting review of the question presented here would require this Court to expend little additional effort. At the same time, however, respondents seek to impose artificial limitations on the extent to which the Eighth Circuit's interrelated decisions are actually before this Court. Our solution, we submit, makes more sense. There is nothing to lose, and both efficiency and certainty to be gained, from ensuring this Court's ability to review, at one time, the Eighth Circuit's treatment of the various jurisdictional issues arising under the 1996 Act.[6]

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The petition for a writ of certiorari should be granted, and this Court should consolidate its review of the question presented in this petition with its review of the questions presented in the petitions for certiorari in No. 97-831 and related cases. In the alternative, the petition should be held pending this Court's decision in No. 97-831 and related cases.

Respectfully submitted.

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APRIL 1998

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[6] If this Court grants this petition instead of holding it, we suggest that it simply consolidate oral argument on the question presented here with argument on the remainder of the jurisdictional issues in this case.